

REMARKS / ARGUMENTS

The enclosed is responsive to the Examiner's Final Office Action mailed on September 9, 2005. At the time the Examiner mailed the Office Action claims 1-103 were pending. By way of the present response the Applicants have: 1) amended claims 1, 8, 9, 10, and 14; 2) added no new claims; 3) no claim is canceled; 4) argued patentability of independent claims 1, 16, 38, 60, and 82 over cited reference; and 5) pursuant to MPEP 2112 IV, respectfully requests that the Examiner provides the rationale or evidence of inherency. As such, claims 1-103 are now pending. The Applicants respectfully request reconsideration of the present application and the allowance of all claims now presented.

Currently Amended Independent Claim:

1. (currently amended) A method, comprising:
 - recurring adjustment of an ongoing data flow between a pair of nodes communicatively coupled by a network, said recurring adjustment performed by way of alterations made to characteristics of said flow, such alterations being scheduled and determined in response to ongoing observations of networking performance statistics related to said flow's previous behavior[.];
 - said recurring adjustment comprising:
 - scheduling of flow control adjustments wherein a flow timeout pointer is positioned with respect to a flow timeout threshold value;
 - said positioning of said flow timeout pointer comprising setting a delay between when a last adjustment is made and when a next adjustment is made;
 - said setting a delay comprising:
 - calculating a first flow timeout threshold level;
 - calculating a second flow timeout threshold level; and
 - wherein:
 - said second flow timeout threshold level is beneath said first flow timeout threshold level.

In the Office Action mailed on September 9, 2005, the Examiner applied one reference, U.S. Patent Publication No. 2003/0140159 (hereinafter "Campbell") in rejecting previously submitted independent claims 1, 16, 38, 60, and 82. The Examiner also rejected dependent claims directed to a flow timeout threshold under the theory of inherency. The Applicant has modified claim 1 to incorporate the flow timeout threshold therein. Therefore, the rejection under the theory of inherency is now also applicable to the independent claim 1.

Pertinent parts of MPEP 2112: Requirements of Rejection Based on Inherency; Burden of Proof- IV - EXAMINER MUST PROVIDE RATIONALE OR EVIDENCE TENDING TO SHOW INHERENCY:

The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993).

To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.' *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999).

In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art. *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990).

The Applicant respectfully disagrees with the application of the theory of inherency to show anticipation of claim limitation regarding the flow timeout threshold for the following reasons: 1) Campbell merely mentions words "fault

tolerance” only once while referring to a third party product, and has provided no other details whatsoever, 2) the Examiner’s conclusion is based on the assumption that ‘fault tolerance’ can only be implemented using flow timeout threshold level, which may not be a correct statement; 3) Applicant’s claims are directed to the flow timeout threshold in a very specific and noble manner; Campbell does not teach, suggest, or disclose, either explicitly or impliedly, the flow timeout threshold in the manner as claimed in the independent claim 1, or in any manner whatsoever. What may be unknown may not necessarily be inherent,

In the Office Action mailed on September 9, 2005, the Examiner has not provided the rationale or evidence tending to show inherency. Pursuant to the guidelines described under MPEP 2112, the Applicant respectfully requests that the Examiner provides the rationale or evidence tending to show that it would have been inherent to include a flow timeout threshold in Campbell in order to handle fault scenarios in the transmission of data between client and server.

Independent claim 1 is directed to scheduling of flow control adjustments wherein a flow timeout pointer is positioned with respect to a flow timeout threshold value; the positioning of the flow timeout pointer comprising setting a delay between when a last adjustment is made and when a next adjustment is made; the setting a delay comprising calculating a first flow timeout threshold level, calculating a second flow timeout threshold level, wherein the second flow timeout threshold level is beneath the first flow timeout threshold level.

Campbell is silent on scheduling of flow control adjustments wherein a flow timeout pointer is positioned with respect to a flow timeout threshold value; the positioning of the flow timeout pointer comprising setting a delay between when a last adjustment is made and when a next adjustment is made; the setting a delay comprising calculating a first flow timeout threshold level, calculating a second flow timeout threshold level, wherein the second flow timeout threshold level is beneath the first flow timeout threshold level. Therefore, Campbell does not teach, suggest, or disclose scheduling of flow control adjustments wherein a flow timeout pointer is positioned with respect to a flow timeout threshold value; the positioning of the flow timeout pointer comprising setting a delay between when a last adjustment is made and when a next adjustment is made; the setting a delay comprising calculating a first flow timeout threshold level, calculating a second flow timeout threshold level, wherein the second flow timeout threshold level is beneath the first flow timeout threshold level.

Independent claims 16, 38, 60, and 82 are directed to updating the statistics of arrival events. Claims further define an arrival event as arrival of one of the messages sent by the server to the client. Contrarily, Campbell logs parameters such as network usage, processor usage and the quality of service data. The Applicant respectfully submits that parameters such as network usage, processor usage and the quality of service are not arrival events as defined by the claims 16, 38, 60, and 82 ("arrival event is the arrival of one of the messages at the client") because these parameters are not arrived at the client (in Campbell, a web browser is a client). Furthermore, Claims 16, 38, 60, and 82 specifically

require that the statistics to be maintained by the client. Campbell, however, discloses that the log is maintained by the server. Therefore, the Applicant respectfully submits that Campbell does not teach, suggest, or disclose all the limitations of the claims 16, 38, 60, and 82.

CONCLUSION

For the reasons provided above, applicant respectfully submits that the current set of claims are allowable. If the Examiner believes an additional telephone conference would expedite or assist in the allowance of the present application, the Examiner is invited to call Robert B. O'Rourke at (408) 720-8300.

Authorization is hereby given to charge our Deposit Account No. 02-2666 for any charges that may be due.

Respectfully submitted,

BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN LLP



Date: 11/9/, 2005

Robert B. O'Rourke
Reg. No. 46,972

12400 Wilshire Boulevard
Seventh Floor
Los Angeles, CA 90025-1030
(408) 720-8300